FOR ARGUMENT

Supreme Court, U.S.
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No. 90-8370

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

TEOFILO MEDINA, JR.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF ON THE MERITS

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QUESTION PRESENTED

In a state criminal prosecution, does the Due Process Clause of the Fourteenth Amendment mandate that the state prove facts beyond those encompassing elements of the crime charged, by assuming the burden of proof for demonstrating a defendant's mental competency to stand trial?

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STATEMENT OF THE CASE

Petitioner was sentenced to death following his conviction for three murders and various other crimes after a trial by jury in Orange County Superior Court. The California Supreme Court denied petitioner's automatic appeal in People v. Medina, 51 Cal.3d 870, 274 Cal.Rptr. 849, 799 P.2d 1282 (1990). (JA 89-163.) On October 21, 1991, this Court granted a petition for writ of certiorari. (JA 165.)

STATEMENT OF FACTS

Petitioner began a 27-day crime spree in October of 1984, when he ran out of a Santa Ana pawn shop with a handgun. (JA 90.) During the course of robbing two gas stations and a drive-in dairy, petitioner shot and killed an employee at each business. (JA 90.) His victims, Horacio Ariza, Douglas Metal, and Victor Rea, were each shot in the side of the head at close

range. When his attempts to rob a convenience store failed, petitioner shot at two citizens, who tried to follow his getaway car. (JA 90.) After arresting petitioner, the registered owner of the getaway car, police recovered the murder weapon from his home. (JA 90.) Petitioner asserted an insanity defense and has never denied the robbery-murders. (JA 90.)

Competency Hearing

A six day pre-trial competency hearing was held before a jury on motion of defense counsel. (JA 3, 6, 16, 20, 80, 84; III RT 567.) Three mental health experts and two physicians testified about petitioner's mental and physical condition, but rendered no opinion about competency to stand trial. Three experts evaluated petitioner to determine competency. One psychiatrist found him incompetent, while another psychiatrist and a psychologist found him competent.

George Sakurai, psychiatrist and director of the Orange County Jail psychiatric team, had seen petitioner approximately eight times primarily for suicidal reasons, agitation and destructive behavior. (JA 6-7; I RT 237.) Sakurai opined the suicide attempt may have been faked as his injuries were "extremely superficial scratches" despite petitioner's possession of half a razor blade. (I RT 235-236, 256.) Sakurai knew petitioner did not want to go to court two weeks earlier, when he returned from court with superficial cuts on his neck. (II RT 233, 255, 257.)

Sakurai was not requested to evaluate petitioner in terms of competency to stand trial, had no experience in that area, and therefore declined to render an opinion. (JA 8-9; I RT 242-243.) Sakurai cleared petitioner to return to court and opined

petitioner's most serious problem was depression. (JA 9-10.)

David Echeandia, a psychologist and clinical director at the Orange County Jail testified that his initial progress note indicated a possibility that petitioner was adopting bizarreness and illness for the sake of his defense. (JA 16, 45.) Echeandia had spoken with petitioner approximately six times and did not consider him to be a paranoid schizophrenic. (JA 18; II RT 332.) While petitioner could at times be quite manipulative, it could not entirely explain his behavior. (JA 43.) Echeandia's diagnosed petitioner as having borderline personality disorder with antisocial features. (JA 46.) Echeandia had not spoken with petitioner regarding competency to stand trial, and made no evaluation on that question. (JA 44.)

Willard Gold, a psychiatrist, knew petitioner as "Frank Rocco" when Gold was Chief Psychiatric Consultant at Arizona Department of Corrections (JA 21, 26-27.) Gold had seen petitioner approximately twice a month between December 20, 1977 and January 18, 1979. (JA 27, II RT 431, 447.) He also saw defendant for an hour the night before Gold's testimony at the competency hearing. (JA 28, 31.)

Gold testified that he found petitioner to be the same as he was in 1979, a paranoid schizophrenic. (JA 29.) He opined that petitioner was not depressed, not suicidal and not a malingerer. (JA 29.)

Gold opined that petitioner was incompetent to stand trial. (JA 29.) Petitioner knew who his defense attorney was and he recognized Dr. Gold, but his psychotic denial precluded him from

recalling why he was being charged with murder. (II RT 433.)

Gold had no information regarding the crimes petitioner was charged with, but knowledge of the facts of the case against petitioner would not alter his conclusion. (II RT 455, 459.) Gold acknowledged that other medical experts disagreed with his diagnosis of schizophrenia in 1978, including a nationally recognized psychiatrist who concluded that petitioner had no sign of mental disorder. (JA 31-35.)

Kaushal Sharma, a self-employed forensic psychiatrist, interviewed petitioner twice in a padded cell at Orange County Jail the month before the competency hearing. (JA 46; II RT 510.) Petitioner was very uncooperative and kept repeating, "I'm paranoid. I'm taking medication. I can't talk to you." (JA 52.) It was difficult to make an

assessment because petitioner was refusing to cooperate.[1/] (JA 53.) The available information, however, suggested competency, rather than incompetency. (JA 48.) It was not a close case in Sharma's opinion. (JA 48.)

Sharma noted that petitioner's behavior was abnormal, as stabbing people is unusual. (II RT 537.) Executing witnesses is also statistically unusual. (II RT 555.) Petitioner, however, "is not a slave of his mental problems." (II RT 542.) As Sharma pointed out to the jury, petitioner is an extremely clean and tidy individual whereas very disturbed people cannot care for their personal hygiene. (II RT 546-547.)

During his last visit with petitioner, Sharma suggested that

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1. Dr. Sharma noted that petitioner was more cooperative when he saw him in 1985 at the request of petitioner's defense counsel. (II RT 564.)

petitioner could answer questions but was not cooperating. Petitioner then stood and shook the glass partition in the interview room until it shattered. (II RT 552.) Based on his personal contacts with petitioner and his review of petitioner's 15 year history, Sharma opined petitioner was malingering. (II RT 523-524.)[2/]

Robert Miller, a mental health specialist with the Orange County Jail testified that the initial working

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2. Gold, the only expert who found petitioner incompetent, acknowledged that transfer to a less secure setting is a motive for malingering. (II RT 445.) While in prison in Arizona, petitioner requested to be transferred to a hospital. (II RT 441.) Petitioner had previously escaped from the courtroom while being sentenced for rape. (II RT 449.) Gold recommended petitioner be transferred to the hospital. (II RT 442.) After petitioner was in a hospital setting, he broke out a window and attempted to escape. (II 442.) A recent weight gain prevented petitioner from making good his escape. (II RT 449.) Gold also acknowledged that avoiding the gas chamber is a motive for malingering. (II RT 444.)

diagnosis when petitioner was first interviewed was schizophrenia, paranoid type. (JA 56-57.) After three weeks of observing and talking with petitioner, and receiving and reviewing other records, the diagnosis evolved into malingering and antisocial personality disorder. (JA 57-58.)

Psychologist, David M. Pierce, met with petitioner in January and February of 1986 for about nine hours and conducted psychological testing. (JA 60; III RT 600.) Results were similar to persons who suffer from schizophrenia, paranoid type, and also with individuals who tend to use regression and denial extensively. (JA 61.)

Pierce spoke with petitioner again in June of 1986 and petitioner did not initially recognize him. (JA 62.) There were many instances where petitioner indicated to Pierce that his memory was

impaired. (JA 63-64.) Petitioner also reported having visual and auditory hallucinations. There was no way to corroborate this. (JA 70.)

Pierce opined that petitioner was competent to stand trial. (JA 64.) Petitioner understood the implications of being found guilty and courtroom procedure. (JA 72.) He described the role of the jury, judge, prosecutor and defense attorney. (JA 73.)

A defense investigator testified that he was unable to discuss the case with petitioner. (JA 84.)

Sanity Phase

Petitioner and lay witnesses recalled his background. He denied any recollection of shooting his victims and outlined numerous assaults, which occurred both in and out of custody, along with his drug use, and attempted escape from a state mental hospital. (JA 92.)

Dr. Gold, testifying for the defense, opined petitioner was a chronic paranoid schizophrenic and was not guilty by reason of insanity. (JA 91.) On cross-examination, Gold conceded he knew nothing of the facts surrounding petitioner's crimes. (RT 6409-6416.)

Dr. Pierce testified that petitioner had a disorder of schizophrenia of a paranoid type, but the evidence did not show he was insane at the time he committed the crimes. (JA 91.)

Dr. Sharma testified that irrespective of whether petitioner was a paranoid schizophrenic, the evidence, particularly the manner in which the crimes were committed, was not sufficient to suggest he was insane at the time of

the offense.[3/] (JA 91; RT 6632, 6634, 6704-6716.)

Dr. Klatte, a psychiatrist, testified that petitioner had no evidence of any kind of mental disturbance which precluded his knowing the nature or quality of his actions and their wrongfulness. Klatte detected evidence of both paranoid schizophrenia and an anti-social personality disorder and found petitioner to be one of the most explosive personalities he had ever met. (JA 92; RT 6879, 6886-6896, 6904-6906.)

Penalty Phase

The prosecution proved petitioner robbed and murdered another gas station

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3. Dr. Sharma observed that petitioner has a "short fuse", which is not a symptom of schizophrenia. Petitioner had a number of symptoms consistent with a sociopathic type of personality. (RT 6636-6637.) Sharma also testified that petitioner's lack of recollection of the crimes could not be supported by medical or psychiatric facts. (RT 6651.)

attendant with the same gun used to kill his three victims in this case. Additionally, evidence of previous crimes and convictions and the passive personalities of the murder victims was introduced. (JA 92.) Petitioner relied on mitigating testimony from medical experts and his father. (JA 92.)

SUMMARY OF ARGUMENT

A state is required to prove only the elements of a criminal offense. A criminal defendant's competency to stand trial is not an element of any charged offense.

Constitutional law affords states great latitude in the proper placement of burdens of proof. Due process concerns arise only when the allocation of that burden subjects defendants to hardship or oppression. A defendant's counsel is in the best position to present evidence relevant to the question of competency.

While defense counsel can readily attest to the situation with a defendant, the People have little or no access to information regarding the defendant's relationship with his counsel, or defendant's actual comprehension of the nature of the criminal proceedings. Accordingly, California's allocation of the burden of proof, through a presumption of competency to stand trial, does not offend concepts of due process of law.

ARGUMENT

I

REQUIRING A CRIMINAL DEFENDANT TO PROVE INCOMPETENCY TO STAND TRIAL DOES NOT VIOLATE THE RIGHT OF DUE PROCESS GUARANTEED BY THE FEDERAL CONSTITUTION

Petitioner Medina complains his right to due process of law guaranteed by the Fourteenth Amendment was violated when California law required him to prove by a preponderance of the evidence that he was mentally incompetent to stand trial on criminal charges. To the contrary,

California's allocation of the burden of proof on the party raising the competency issue is consistent with this Court's recognition of the great latitude the federal constitution affords states in the proper placement of burdens of proof. Petitioner has not been denied due process of law and his sentence of death should be affirmed.

It is well established that the conviction of a criminal defendant while he is legally incompetent violates due process of law. (Pate v. Robinson 383 U.S. 375, 385 (1966).) A trial court's failure to employ procedures to protect against trial of an incompetent defendant violates a defendant's due process right to a fair trial and compels reversal of his conviction. (Ibid., see, Drope v. Missouri 420 U.S. 162, 171 (1975).)

The criteria for determining mental competency enunciated by this Court in

Dusky v. United States, 362 U.S. 402 (1960) involves a defendant's ability to "consult with his lawyer with a reasonable degree of rational understanding" and to have a "rational as well as factual understanding of the proceedings against him."

The requirements due process imposes vary depending on the right involved. As Chief Justice Rhenquist observed in his dissent in Santosky v. Kramer 455 U.S. 745 (1982)):

> "Due process of law is a flexible constitutional principle. The requirements of which it imposes upon governmental actions vary with the situations to which it applies. As the Court previously has recognized, 'not all situations calling for procedural safeguards call for the same kind of procedure.' [citations omitted] The adequacy of a scheme of procedural protections cannot, therefore, be determined merely by the application of general principles unrelated to the peculiarities of the case at hand." (Id., pp. 774-775.)

Before this Court will hold that the constitution requires a state to do more, the "fairness and reliability" of existing state procedures must be considered. (Santosky v. Kramer, supra, 455 U.S. at p. 775.)

California law provides for a hearing on the question of competency to stand trial if "a doubt arises in the mind of the judge as to the mental competence of the defendant", the court shall inquire of defense counsel, and if defense counsel believes his client may be incompetent, the trial court shall order a hearing. (Cal. Pen. Code, § 1368(a).) Even if defense counsel believes his client to be competent, the trial court has discretion to order a competency hearing. (Cal. Pen. Code §1368(b).) Once the trial court has ordered a competency hearing "all proceedings in the criminal prosecution shall be suspended until the question of

the present mental competence of the defendant has been determined." (Cal. Pen. Code § 1368(c).)

California law places the burden of proof on the question of a criminal defendant's competence to stand trial on the party raising the issue. (People v. Medina 51 Cal.3d 870, 799 P.2d 1282 (1990); JA 100-101.) Specifically, section 1369, subsection (f) of the California Penal Code provides:

> "In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally incompetent unless it is proved by a preponderance of the evidence that the defendant is mentally competent. The verdict of the jury shall be unanimous." (Cal. Pen. Code, § 1369(f); emphasis added.)

Here, petitioner's counsel made a motion for a competency hearing.

Accordingly, the burden of proof on the

question of mental competency to stand trial was placed on petitioner.

A. <u>The Federal Constitution affords states great latitude in the proper placement of burdens of proof</u>.

An analysis of previous decisions by this Court compels the conclusion that due process does not require the prosecution to bear the burden of proof on the question of mental competency to stand trial. Due process demands that every fact necessary to constitute the charged crime must be proved by the prosecution beyond a reasonable doubt. (<u>In Re Winship</u>, 397 U.S. 358, 364 (1970).) The beyond a reasonable doubt burden of the prosecution, however, does not apply to all factual determinations related to a criminal prosecution.

In <u>Leland v. Oregon</u> 343 U.S. 790 (1952) this Court distinguished issues of fact in criminal proceedings which do not require application of the beyond a

reasonable doubt standard. Specifically, Leland held there is no constitutional requirement that the state shoulder the burden of proving the sanity of a defendant at the time of an offense.

The question of insanity as a defense to criminal charges was considered by the jury only after it had found all of the elements of the offense, including mens rea, if any, had been proven beyond a reasonable doubt. Legal insanity bears no necessary relationship to the existence or non-existence of the required mental elements of the crime. (Leland v. Oregon, supra, 343 U.S.)

This Court's opinion in Leland clearly stands for the proposition that it does not offend the federal constitution to place upon the defendant the burden of establishing matters which have no necessary relationship to the elements of

the crime. This Court has repeatedly reaffirmed this principle.

In Mullaney v. Wilbur, 421 U.S. 684 (1975) this Court concluded a state could not require a defendant to prove certain elements to reduce the crime of murder to manslaughter. In a concurring opinion, however, then Justice Rehnquist, made it clear that the Mullaney decision did not change the rule first announced in Leland, i.e., that it was constitutionally permissible to require the defendant to carry the burden of proof on a mental defense such as insanity. (Mullaney v. Wilbur, supra, at pp. 705-706.)

In Patterson v. New York 432 U.S. 197 (1977) this Court upheld the constitutionality of a New York law which required a defendant charged with second degree murder to prove by a preponderance of the evidence extreme mental disturbance, which was an affirmative

defense reducing his crime to manslaughter. In Patterson, this Court also reaffirmed Leland. (Patterson v. New York, supra, at p. 205; see, Rivera v. Delaware, 429 U.S. 877 (1976).)

In Martin v. Ohio, 480 U.S. 228 (1987) this Court upheld Ohio provisions that placed the burden of proving an affirmative defense on the defendant in a criminal proceeding. In reaching this conclusion this Court again reaffirmed its decision in Leland v. Oregon, supra. (Martin v. Ohio, supra, at p. 236.)

In California, the competency hearing is not a criminal proceeding. (People v. Fields 62 Cal.2d 538, 540, 42 Cal.Rptr 833, 399 P.2d 369 (1965).) Moreover, it has no relation to proving the elements of criminal conduct. Rather, a section 1368 proceeding involves the defendant's mental state for standing trial. It assesses his ability to cooperate with counsel at the

time of trial, not his mens rea at the time the crimes were committed. Under these circumstances none of the decisions of this Court compel the conclusion the state must carry the burden of proving a lack of mental competency to stand trial. The state only carries the burden of proof when it must prove the elements of a crime. (See e.g., Martin v Ohio, supra, 480 U.S. 228; Patterson v. New York, supra, 432 U.S. 197.)

Petitioner unpersuasively asserts that the analogy to Leland rests with historical confusion between insanity at the time of the offense and incompetency at the time of trial. To the contrary, the analogy rests with the fact that there is no necessary relation between the competency to stand trial determination and guilt.

The culpability of a defendant is not in issue in a competency proceeding.

Competency relates to the appropriateness of trial and has no relevance to the question of culpability. It does not necessarily follow that error favoring the prosecution will result in an innocent person being convicted. A defendant will have the protections of the beyond a reasonable doubt standard at trial, irrespective of how the burden of proof is allocated at a competency hearing. The constitutionally compelled beyond a reasonable doubt rule is not offended by the allocation of the burden of proof in competency proceedings.

Petitioner argues, however, that the analogy to Leland must fail because the right to present an insanity defense does not involve a fundamental right, whereas the right not to be tried while mentally incompetent is a fundamental right. This argument is meritless.

This Court has clearly recognized that there are fundamental rights where there is no necessary relation between the determination of the right and the guilt determination in a criminal trial. For example, the constitution does not mandate that voluntariness of a confession be established beyond a reasonable doubt. (Lego v. Twomey 404 U.S. 477, 486-487 (1972).) Lego recognizes that where the accuracy of a determination may enhance, impair, or have no effect, on the question of guilt, there is no necessary relation between the proceeding and the issue of guilt. Accordingly, those determinations, even if involving fundamental constitutional rights, are not subject to the requirements of Winship.

B. The history of the requirement of mental competency for trial supports California's allocation of the burden of proof.

The principle that a mentally incompetent defendant not stand trial has

common law origins and acceptance as a principle of fundamental fairness. The importance which has historically been attached to the right to be competent should also be examined. (See, In re Winship, supra, 397 U.S. 358, 363-368).) Petitioner unpersuasively contends that California's procedure cannot be historically justified.

Historically, a criminal defendant was unevenly matched, compelled to proceed in pro se against an experienced prosecutor. (Winick, *Restructuring Competency to Stand Trial*, 32 U.C.L.A. L.Rev. 921, 952; See also, Faretta v. California 422 U.S. 806 (1975).) The criminal defendant stands before the court in a far different position today, based on the constitutional guarantee of adequate counsel, irrespective of ability to pay. (See, Gideon v. Wainwright 372 U.S. 335 (1963).)

In California, a criminal defendant cannot represent himself in a competency proceeding. The trial court has a continuing duty, the defense attorney and prosecutor a continuing ethical obligation, to raise the issue of competency at any point in the proceedings, even if a hearing has already been held. These protections distinguish the modern defendant from those tried at common law.

Moreover, what is significant about petitioner's historical analysis is the fact that English common law developed to the point in 1959 where it placed the burden of proof on the question of competency on the party raising the issue. (R. v. Podola, 1 Q.B. 325, 3 All Eng.Rpts. 418, appeal dismissed 3 All Eng.Rpts 426 (Crim.App. 1959). Since at least 1918 it has been established in California that a defendant has the burden of establishing

incompetency to stand trial. (People v. Lawson 178 Cal. 722, 727 (1918); see also, People v. Mayes, 202 Cal.App.3d 908, 916, 248 Cal.Rptr 899 (1988).) California and England are not alone in requiring defendants to bear the burden of proof on the question of competency.

California is among 14 states which place the burden of proof either on the moving party or on the defendant.[4/] The

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4. Henry v. State, 647 S.W.2d 419, 426 (Ark. 1983); Ark.Code § 5-2-302; People v. Medina, supra, 51 Cal.3d 870, 799 P.2d 1282; California Penal Code § 1369(f); Gomez v. District Court 500 P.2d 134, 136 (Colo. 1972); Colo.Rev.Stat. Ann. § 16-8-111(2); Conn.Gen.Stat. § 54-56d(b); Flowers v. State, 353 So.2d 1259, 1260 (Fla.App. 1978); Wallace v. State 248 Ga. 255, 282 S.E.2d 325, 330, cert. den. 453 U.S. 927 (1981); State v. Aumann 265 N.W.2d 316, 319-320 (Iowa 1978); Mozee v. Commonwealth 769 S.W.2d 757, 758 (1989 Ky.); State v. Rogers 419 So.2d 840, 843 (La. 1982); L.S.C.A.CR.P. § 641; State v. Chapman 104 N.M. 324, 721 P.2d 392, 395 (1986); Miller v. State 751 P.2d 733 (Okla.Crim. 1988); Commonwealth v. Martinez 446 A.2d 899, 901 (Pa. 1982); Pa.Stat.Ann.Tit. 50 § 7403(a); Barber v. State 757 S.W.2d 359, 363 (Tex.Crim. 1988), cert. den. 489 U.S. 1091 (1989); Texas Code Art. 46.01 § 1(6); Va.Code Ann.

federal statute also places the burden of proof on the moving party. (28 U.S.C. § 4241; See also, Federal Government's Amicus Brief in Support of Respondent.)

Petitioner complains that California is among a minority of states that compel a defendant to prove competency for trial. Notably, no greater number of states place the burden of proof upon the prosecution as on the defendant. Only 14 states place the burden of proof on the party asserting competency or on the prosecution.[5/] The

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§ 19.2-169.1E.

5. Jones v. State (Alaska), 812 P.2d 613 (1991); Alaska Stats. § 12.47.100; Diaz v. State, 508 A.2d 861 (Del. 1986); Del.Stats. Art. 11 § 404; People v. Garlick, 360 N.E.2d 1121 (Ill.1978); Ill.Rev.Stat., ch. 38, § 104-11(c); Treece v. State, 313 Md. 665, 547 A.2d 1054, 1063 (1988); Commonwealth v. Crowley, 393 Mass. 393, 471 N.E.2d 353 (Mass.1984); State v. Bertrand, 465 A.2d 912 (N.H. 1983); State v. Otero, 570 A.2d 503 (N.J. 1986); State v. Von Braunsberg, 292 N.E.2d 303 (N.Y. 1972); State v. Heger, 326 N.W.2d 855, 858 (N.D. 1982); State v. Law, 244 S.E.2d 302, 308 (S.C. 1978); State v. Surface, 440 N.W.2d 746 (S.D. 1989); State v. Jones, 406 N.W.2d 366, 369 (S.D. 1987); State v.

remaining 22 states have made no allocation of a burden of proof either through legislation or judicial decision.[6/]

As this Court observed in Martin v. Ohio, supra, 480 U.S. at pp. 236-237, however, the relevant inquiry is what the Constitution requires, not what a majority of states have chosen to do.

Black, 815 S.W.2d 166, 174 (1991 Tenn.) Wis. Stat Ann. § 971.14(4) (1990); Loomer v. State 768 P.2d 1042, 1045 (Wyo. 1989).

6. Ariz. R. Cr. Pro., Rule 11.1 (1987); Haw. Rev. Stat. §704-405 (1985); Idaho Code §18-212 (1987); Ind. Code Ann. §35-36-3-1 (1986); Kan. Stat. Ann. §22-3302 (1988); Ky. Rev. Stats. Ann. §§ 504.100(3) (Michie 1990); Me. Rev. Stat. Ann. Tit .15 § 101-B (West Supp. 1990); Mich. Comp. Laws Ann. §330.2020 (West 1980); Miss. Code Ann. § 99-13-11 (1972); Mo. Rev. Stat. § 552.020(7) (Vernon 1987); Mont. Code Ann. § 46-14-221 (1989); Neb. Rev. Stat. Ann. § 29-1823 (1989); Nev. Rev. Stat. Ann. § 178.415 (1986); N.C. Gen. Stat. § 15A-1002 (1988); Or. Rev. Stat. § 161.370 (1990); R.I. Gen. Laws § 40.1-5.3-3(3) (1990); Utah Code Ann. § 77-15-5 (1990); Vt. Stat. Ann. Tit. 13 § 4817(b) (1974). See, Hensley v. State 575 NE.2d 1053, 1055-1056 (Ind.App. 1991). (Absence of allocation of burden of proof does not violate due process.)

C. A balancing of factors supports California's allocation of the burden of proof in competency to stand trial proceedings.

In a criminal prosecution, due process concerns arise only when the allocation of a burden of proof subjects the defendant to hardship or oppression. (Morrison v. California, 291 U.S. 82, 88-89 (1934).) In determining the propriety of a burden of proof allocation, a critical factor is the parties relative access to relevant information. (Id., at p. 89.)

1. The defendant's access to information and opportunity for knowledge clearly justify allocation of the burden of proof to defendants on the issue of mental competency to stand trial.

Given the relevant focus of a competency hearing, the defense clearly is in the better position to address the issue. A defense attorney's observations and opinion with respect to his client's competency may be very probative on the question of competency. It is the defense

counsel who will be aware of problems with communication or cooperation which may hamper the presentation of a defense. (Pizzi, *Competency to Stand Trial in Federal Courts: Concepts and Constitutional Problems*, 45 U. Chi. L. Rev. 21, 58-59 (1977).) Indeed, the first hand evaluation of defense counsel "may be as valuable as an expert psychiatric opinion. . . ." United States v. David, 511 F.2d 355 (D.C. Cir. 1975); See also, United States ex rel. Roth v. Zelker, 455 F.2d 1105, 1108 (2nd Cir.) cert. den. 408 U.S. 927 (1972).

The defense attorney's knowledge of the particular case and his access to the defendant place him in the position of being able to derive the requisite information for a competency determination. Petitioner's argument ignores the practical problems intrinsic

in the prosecution marshalling evidence on the question of competency.

The prosecution's access to information from the defendant will be limited to compulsory psychiatric examinations. Ironically, petitioner assails the value of psychiatric experts, thereby undermining the value of the only basic sources of information available to the prosecution. It is the defense counsel who truly has access to the defendant in the context of the core issues to be resolved, i.e., the defendant's level of understanding of the particular case and ability to communicate with counsel.

Petitioner notes that it is a strange rule of law when a criminal defendant is required to prove his own incompetency, as the disability he would be attempting to establish would render him incapable of sustaining his burden of proof. (See,

People v. Bender, 20 Ill.2d 45, 169 N.E.2d 328, 332 (1960); accord United States v. DiGilio, 538 F.2d 972, 988 (3 Cir. 1976).) This argument cannot withstand scrutiny. When the focus of a competency hearing is considered with the fact a criminal defendant is represented by counsel, it is clear that a defendant is by no means incapable of sustaining a burden of proof.

Petitioner relies on United States v. DiGilio, supra, 538 F.2d 988 which held it is "contradictory to argue that a defendant who may be incompetent possesses sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." (See also, Bilyew v. Franzen, supra, 686 F.2d 1238 (7th Cir. 1982).) As the California Supreme Court observed:

> "[O]ne might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to the court's

competency inquiry. Indeed, this analysis affords a satisfactory answer to Bilyew's (supra, 686 F.2d 1238) concern about the defendant's possible inability to cooperate with his counsel in establishing his incompetence: Counsel can readily attest to any such defect or disability. The People, on the other hand, have little or no access to information regarding the defendant's relationship with his counsel, or defendant's actual comprehension of the nature of the criminal proceedings." (People v. Medina, supra, 51 Cal.3d 870, 885; JA 99-100.)

In Bilyew v. Franzen, supra, 686 F.2d 1238 the federal Court of Appeals concurred with a line of Illinois state court decisions which declared a state statute placing the burden of proof of competency on a defendant unconsti-tutional. Bilyew asserted that

"There is little question that the Fourteenth Amendment requires the state or federal prosecution to shoulder the burden of proving the defendant is fit to stand trial once the issue of unfitness has been properly raised. [Fn. omitted.] Every court that has considered the issue has so held. [citations omitted]." (Id., at pp. 1244-1245.)

The absence of question perceived by Bilyew may be attributable to its failure to acknowledge existing contrary authority. As the California Supreme Court observed, there is "substantial authority" supporting a contrary view." (People v. Medina, supra, 50 Cal.3d at p. 883; JA 97.) As noted above, this Court upheld a state statute placing the burden of proof on a defendant to establish his own insanity, despite the possibility his mental condition might prevent an effective showing. (Leland v. Oregon, supra, 343 U.S. 790, 798-799, See, Martin v. Ohio, supra, 480 U.S. 228, 236.)

Irrespective of the defendant's mental condition, the allocation of the burden of proof upon the defense, does not violate "generally accepted concepts of basic standards of justice" and this Court should decline to interfere with a state's determination of policy. (See, Leland v.

Oregon, supra, at p. 799.) There is no hardship upon a defendant assessing and presenting evidence on competency to stand trial. (See Morrison v. California, supra, at pp. 88-89.)[7]

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7. Petitioner contends that the appropriate analysis is set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The factors in Mathews are not the appropriate focus for the question presented here.

This Court identified three factors in Mathews v. Eldridge to be considered in determining whether a specific procedural safeguard is mandated before the government can deprive an individual of a liberty or property interest. Mathews v. Eldridge, supra, 424 U.S. at p. 335. The factors Mathews balanced are (1) the private interest which will be affected by the official action being taken; (2) the degree of risk of an erroneous deprivation of that private interest through the procedures being used, contrasted with any probable value of added or substituted safeguards; and (3) the government's interest, as well as the added burdens any additional or substitute procedural requirements would entail. (Mathews v. Eldridge, supra, 424 U.S. 319, 335 (1976).)

Petitioner's right not to stand trial while mentally incompetent clearly constitutes a fundamental interest. (Drope v. Missouri, supra, 420 U.S. 162, 172 (1975).) So, the first factor of a Mathews analysis is not even in question. The second prong of Mathews encompasses

California's policy determination as to the burden of proof is well founded. The competency proceeding concerns the defendant's ability to interact with his attorney and his understanding of the criminal proceedings pending against him. (Drope v. Missouri, supra, 420 U.S. 162, 171-172.) The defendant and his counsel clearly are in a better position than the prosecution to put forward relevant evidence on these points.

If petitioner's concern over a possibly mentally ill defendant being required to show his incompetency is valid, the next step would be to require

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the ultimate issue in this case, e.g., the proper allocation of proof among the parties. The third prong addresses fiscal and administrative burdens which is relevant to the types of entitlements addressed by Mathews, i.e., social security benefits, but not a focus for determining the allocation of burden of proof in a competency hearing. Morrison v. California, supra, sets forth the appropriate framework for a due process analysis.

an affirmative finding of mental competence as a prerequisite to participating in a competence hearing. The fact that petitioner is represented by counsel, and the duties and obligations of the judge, defense attorney, and prosecutor to raise the issue of competency at any point in criminal proceedings, adequately safeguards the defendant.

Petitioner's attempt to translate the fallibility of psychiatric diagnosis into a basis for requiring the prosecution to shoulder the burden of proof on the question of competency necessarily fails. A question of fallibility would counsel against compelling the prosecution to prove competency of criminal defendants. Psychiatric testimony may represent the prosecution's sole information on the question of competency.

Moreover, a very real possibility of abuse is present in motions for a competency hearing. The defense may be using the process to effect a delay in the proceedings, which enures to the defendant's benefit. (Wexler & Scoville, *Incompetency to Stand Trial*, 13 Ariz.L.Rev. 160, 161-162.)

Professional publications advising psychiatric experts to be alert for signs of malingering are interpreted by petitioner as a basis for concluding there is a significant risk of error in competency proceedings. In reality, the authority cited by petitioner illustrates the gross potential for abuse of the system by feigned claims of mental incompetency.[8/]

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8. Dr. Gold acknowledged a study at Stanford University by Dr. Rosenhan entitled, "Being Sane and Insane Places." (II RT 435.) Eight people including three psychologists and a pediatrician, went to psychiatric hospitals seeking admission by claiming they were hearing voices. (II RT

Petitioner complains it is unconstitutional to compel a defendant to stand trial when the evidence is in equipoise on the question of mental competence. This argument ignores the nature of the determination being made. First, if a defendant cannot meet the minimal showing demanded by preponderance of the evidence, it is fitting that he proceed to trial.

Further, unlike guilt and innocence, mental competence is presented on a continuum. Therefore, in a case with the evidence in equipoise, the defendant is

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436.) After feigning mental illness, all eight were admitted and retained for a minimum of one week, and one remained hospitalized for 52 days. (II RT 438.)

A follow-up of the study evolved when a doctor challenged the author to send feigning patients to him. The doctor identified approximately 30 patients as attempting to fool him, when in reality no one had attempted to gain admission in response to the doctor's challenge. (II RT 439.)

clearly not on the upper range of the continuum of incompetence.

Moreover, once a defendant is found guilty, the inquiry ends. In contrast, after a defendant is found competent, the trial court, prosecutor, and defense attorney have a continuing obligation to raise the issue of incompetency throughout the proceeding. Accordingly, the image of a madman unjustly condemned to proceed to verdict is unfair and not possible given the myriad of procedural protections afforded defendants on the issue of mental competency in California.

The requirement of the prosecution proving guilt beyond a reasonable doubt is designed to increase the respect and confidence of the community in the moral force of the criminal law. (In re Winship, supra, 397 U.S. 358, 363-364.) Increasing the opportunity for error favoring defendants on the issue of mental

competency would hardly have such a salutary effect.

In reality petitioner is suggesting that should the jury regard his behavior as a mere manipulation of the system, he should still prevail on his claim of incompetency by virtue of placing the burden of proof on the prosecution. The constitution does not compel such a result.

2. <u>Any error was harmless beyond a reasonable doubt</u>

Only one of the three experts evaluating petitioner believed him to be incompetent. The true disagreement surrounding petitioner is whether he is actually a schizophrenic. As Dr. Pierce pointed out, however, schizophrenics can be mentally competent to stand trial.

The lone expert favoring petitioner's incompetence ignored the facts and circumstances of his crime spree, simply stating that petitioner is incompetent

because he cannot remember why he is charged with murder. Given the evidence presented below, any error of a constitutional magnitude would be harmless beyond a reasonable doubt. (Chapman v. California 386 U.S. 18 (1967)

II.

PETITIONER'S RIGHT TO DUE PROCESS WAS NOT ABRIDGED WHEN THE JURY WAS INSTRUCTED HE "IS PRESUMED" COMPETENT UNLESS A PREPONDERANCE OF EVIDENCE SHOWS INCOMPETENCE

Petitioner also contends that instruction of the jury below to presume he was mentally competent violated his right to due process because such a presumption is irrational and the jury improperly gave evidentiary weight to the presumption. This argument ignores the fact the "presumption" in question is not technically a presumption, rather it is merely a restatement of the allocation of the burden of proof on the question of mental competency. If the presumption

employed below is anything other than a restatement of the allocation of the burden of proof, this Court should decline to consider petitioner's challenge to the use of the presumption.[9/] Finally, California's presumption that a criminal defendant is mentally competent to stand

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9. It is well settled that where an issue is not explicitly raised below and not decided by the state court, there is a "weighty presumption" against review by this Court. (Heath v. Alabama, 474 U.S. 82, 87 (1985)). Petitioner's due process challenge below, and the California Supreme Court's decision, focused solely on the propriety of the allocation of the burden of proof to a criminal defendant. (JA 93-105.)

While the question on which review was granted in this case included a reference to the fact that California law contains a presumption of competence, the focus of the question was solely the allocation of the burden of proof. Indeed, petitioner's argument in support of his petition for writ of certiorari never referenced the argument now being raised in the brief on the merits. Pursuant to Rule 24.1(a) of the rules of this Court, this argument should not be considered on the merits, if anything other than the restatement of the allocation of the burden of proof is involved, as the argument would then represent a change in the substance of the question presented.

trial is rational and therefore constitutional.

The instruction defines preponderance and tells the jury a defendant must show his incompetence by a preponderance. It is nothing more than a restatement of the allocation of the burden of proof on the issue before the jury. (JA 87.)

The "presumption" of competency is not technically a presumption for purposes of analysis. As this Court observed in Taylor v. Kentucky, 436 U.S. 478, 483-486 (1978), the presumption of innocence is not technically a presumption, rather it is a restatement of the prosecution's burden of proving a defendant's guilt beyond a reasonable doubt.

The same basis underlies both presumptions. Most people in society are mentally competent and innocent of criminal activity. Another "presumption" of this type is that most people are sane

at the time of the commission of an offense. The trier of fact generally starts with the premise of what is normal and the abnormal is established by sufficient evidence to the contrary.

Petitioner argues there should be no presumption of mental competency after a trial judge has formally declared a doubt by ordering the competency hearing. Relying on the "prima facie" showing which gave rise to the competency hearing, petitioner concludes any presumption of competency is irrational after that time. Petitioner would never suggest, however, that a presumption of innocence is irrational following a defendant being bound over for trial after a preliminary hearing.

The presumption of innocence serves to remind jurors that the determination of guilt is to made by them. Clearly, it is rational to infer a greater likelihood of

guilt once a criminal defendant has been bound over for trial. Probabilities, however, do not alter the allocation of burden of proof which has been established. The same remains true of a competency determination. The issue is to be resolved by the jury, and a restatement of that fact in a "presumption" of competency does not alter that fact and does not give rise to an irrational presumption.

CONCLUSION

For the foregoing reasons,

California's allocation of burden of proof

in competency hearings is constitutional.

Dated: January 2, 1992.

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TEOFILO MEDINA, JR.

Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF ON THE MERITS as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Michael Pescetta
Deputy State Public Defender
221 Main Street, 10th Floor
San Francisco, California 94105

Counsel for Petitioner

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 2nd day of January, 1992.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, January 2, 1992.

Arlene M. Ryan
ARLENE RYAN

Subscribed and sworn to before me
this 2nd day of January, 1992.

Anne Marie Boyd
Notary Public in and for said County and State

ANNE MARIE BOYD
Notary Public—California
County of San Diego
My Commission Expires 11, 10 92

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